



KONINKLIJKE VLAAMSE ACADEMIE VAN BELGIE
VOOR WETENSCHAPPEN EN KUNSTEN

SUBSIDIARITY AND MULTI-LEVEL GOVERNANCE

12 October 2011

Jan Loisen & Ferdi De Ville (editors)

CONTACTFORUM

Handelingen van het contactforum “Subsidiarity and Multi-level Governance” (12 oktober 2011, hoofdaanvrager: Koen Defeyter, Universiteit Antwerpen) gesteund door de Koninklijke Vlaamse Academie van België voor Wetenschappen en Kunsten.

Afgezien van het afstemmen van het lettertype en de alinea's op de richtlijnen voor de publicatie van de handelingen heeft de Academie geen andere wijzigingen in de tekst aangebracht. De inhoud, de volgorde en de opbouw van de teksten zijn de verantwoordelijkheid van de hoofdaanvrager (of editors) van het contactforum.



KONINKLIJKE VLAAMSE ACADEMIE VAN BELGIE
VOOR WETENSCHAPPEN EN KUNSTEN

Paleis der Academiën
Hertogsstraat 1
1000 Brussel

Niets uit deze uitgave mag worden verveelvoudigd en/of openbaar gemaakt door middel van druk, fotokopie, microfilm of op welke andere wijze ook zonder voorafgaande schriftelijke toestemming van de uitgever.

© Copyright 2012 KVAB
D/2012/0455/??
ISBN 978 90 6569 ??? ?

No part of this book may be reproduced in any form, by print, photo print, microfilm or any other means without written permission from the publisher.

Printed by Universa Press, 9230 Wetteren, Belgium



KONINKLIJKE VLAAMSE ACADEMIE VAN BELGIE
VOOR WETENSCHAPPEN EN KUNSTEN

Contactforum Subsidiarity and Multi-level Governance

TABLE OF CONTENTS

Introduction	7
<i>Jan Loisen and Ferdi De Ville</i>	
Subsidiarity, Anarchism, and the Governance of Complexity	15
<i>Hugo Durieux</i>	
Historical Reflections on the Principle of Subsidiarity in the European Union	27
<i>Emiel Lamberts</i>	
The Never-Ending Story: How the Adoption of the Subsidiarity Principle Contributed to Old and New Conflicts in the European Union	35
<i>Kees van Kersbergen and Bertjan Verbeek</i>	
Subsidiarity, Multi-Level Governance and Flemish Sub-State Diplomacy: Conflict, Duplication or Complementary to the Central Level?	45
<i>David Criekemans</i>	
The Legal Enforcement of Subsidiarity Through the Lens of Flanders	63
<i>Werner Vandenbruwaene</i>	
Are Aid Effectiveness and Subsidiarity Compatible? Challenges of the European Division of Labor for Flanders (Belgium)	77
<i>Evert Waeterloos and Robrecht Renard</i>	
Subsidiarity, Cultural Diversity and the EU-Korea Protocol on Cultural Cooperation ...	93
<i>Jan Loisen</i>	
Public Service Objectives and Power Games: How Subsidiarity Issues Cloud Debates on the Future of Public Broadcasting	111
<i>Karen Donders</i>	

Subsidiarity and EU Trade Policy: Overview of the (Complex) Discussion, Treaty of Lisbon, and Implications for Flanders	125
<i>Ferdi De Ville</i>	
Judicialization and Forum Shopping. The Case of Global Intellectual Property Rights Protection	137
<i>Dirk De Bièvre and Lars Thomann</i>	

INTRODUCTION

Jan Loisen* & Ferdi De Ville°

** Vrije Universiteit Brussel*

° Universiteit Gent

1. SUBSIDIARITY: CONCEPTUAL AND PRACTICAL AMBIVALENCE

When in the second half of the 1980s debates regarding further European integration commenced, and an agreement on the division of different community, national and regional competences had to be elaborated, the principle of subsidiarity became the center of attention. It was not a new concept. Already in Aristotle's *Politeia*, and later by influential authors like de Tocqueville and John Stuart Mill, the principle was referred to. The principle of subsidiarity would also take central stage as a key concept in the Christian democratic sociale doctrine in the 1930s. Included in the papal encyclical *Quadragesimo Anno* of 1931, subsidiarity was meant to defend the individual against rising totalitarianism. All approaches concerning subsidiarity have in common an emphasis on the limited role of the state. The state should intervene as little as possible in the performance of duties of smaller communities and individuals. A society consists of different spheres that are to a certain extent sovereign, and this sovereignty needs to be respected. Subsidiarity, as defined in the European Union (EU), defines the essence of the community's intervention: national action is the rule, community action the exception. Subsidiarity as a managing principle in the EU has two dimensions: first, the Community has to refrain from intervention when member states can more efficiently or appropriately achieve objectives, and second, it must act effectively when necessary (i.e. when goals can be achieved through European intervention). Hence, the Community institutions (and most notably the European Commission) are bound by both abstention and intervention (Pauwels, 1995: 432-435). This essence can be transposed to other policy levels and policy domains in the increasingly complex multilevel governance of policy issues.

Notwithstanding that the principle appears straightforward at first sight, several reservations should be made however. First, different authors argue that the concept is not only complex, but ambivalent (van Kersbergen and Verbeek, 2007: 224-225) and fluid (de Búrca, 2000: 11) as well, and that, depending on the policy issue, context or relationship between policy levels, applied differently (Carozza, 2003: 39):

The problem, one might conclude, is that such a principle is too imprecise and soft, and therefore entirely open to disagreement – a reification of politics as indeterminate as the discourse of human rights itself. In that case, subsidiarity would not contribute anything other than a new vocabulary, a new rhetorical structure, within which to

contest the same values and principles that it was meant to address. The only sure way to address that challenge is to put subsidiarity to the test by seeking to apply it to concrete, "real world" problems. [...] we must remember that subsidiarity is a general principle, not a clear rule. Even within the existing uses of subsidiarity in the law and politics of the European Union the principle is clearly not a "hard" enough concept to resolve by itself the complex and multifaceted issues of unity and pluralism that underlie it (Carrozza, 2003: 78-79).

Second, the conceptual ambiguity is transferred into practice. On the one hand, the member states have an argument at their disposal to counter unwanted community interference. On the other hand, the principle of subsidiarity makes decision-making practice more complicated. Moreover, it is possible that member states abuse the subsidiarity principle to thwart community action that is necessary for certain reasons. In a similar vein, the community institutions may misuse the principle. Whereas some fear that subsidiarity is used to stretch community competences, the community may, in turn, hide behind the principle not to take action (Pauwels, 1995: 435-436).

2. SUBSIDIARITY AND MULTI-LEVEL GOVERNANCE: CONTEMPORARY DEVELOPMENTS AND DEBATES

Notwithstanding these reservations, the principle of subsidiarity remains fundamental to the EU's operation. Furthermore, the principle is particularly relevant for the relationship between the EU, Belgium and the Belgian regions on the one hand, and for the organization of multi-level governance among states and multilateral organizations on the other.

First, on the level of the EU and the European member states, the central position of subsidiarity has been acknowledged once more in the context of the European Convention preparing a European Constitution. The working group on subsidiarity advanced some changes as regards the operationalization of the principle. In spite of the constitution's failure, the plans with regard to subsidiarity have been largely maintained in the Treaty of Lisbon and its protocol on subsidiarity. The so-called subsidiarity test is worth mentioning in this regard: in case the member states feel that European legislative action is incompatible with the subsidiarity principle, they can put forward an appeal (van Kersbergen & Verbeek, 2007: 228-231). Another complex issue in which subsidiarity plays a role concerns the action of the Union or the member states in policy domains where different competences meet (e.g. trade or competition vs. culture).

Second, the Belgian context provides for extra arguments to deeply reflect on subsidiarity. Since the constitutional reform of 1993, the Belgian federated entities are able to engage in foreign relations regarding policy domains for which they are internally (i.e. in the Belgian federal structure) competent (the principle *in foro interno, in foro externo*). How the relations between the regions, the federal government and the EU are organized accordingly – e.g. how would a subsidiarity test proceed in case of regional competences – is not always that clear however (Beyers & Bursens, 2006: 71-72).

Third, increasingly an academic debate is held with regard to subsidiarity on a global level. Often reference is made to the relation of the World Trade Organization (WTO) – a strong multilateral institution with a relatively effective dispute settlement system – with other multilateral organizations (e.g. the International Labour Organization; the World Intellectual

Property Organization; the United Nations Educational, Scientific and Cultural Organization) and states. Whereas some authors put forward a constitutionalization discourse that assigns a central role to the WTO in global governance (Petersmann, 2005; Jackson, 2001), others argue for more balanced global relations on the basis of the principle of global subsidiarity (Howse & Nicolaïdis, 2003).

Next to conceptual ambivalence, the questions therefore rise whether subsidiarity, which is essentially a political principle, is effectively applied, and what the experiences with subsidiarity are in different policy issues and research domains. Specific questions that come to the fore are: whether the pendulum has swung into the direction of more regional autonomy, possibly undermining a more effective achievement of policy objectives on the European and global level; whether local, regional, national, European, and transnational policy levels gradually find an effective *modus operandi*; in which domains is this the case, in which domains not; how is subsidiarity conceived in cases where different competence regimes meet; does the extension of Flanders' foreign policy autonomy encounter certain borders, and, if so, which ones; what are the costs and benefits of this competence extension for Flanders; as global subsidiarity is inspired by the European principle of subsidiarity, can we simply transpose the concept to a truly global multilevel governance context; when is the most adequate policy level the local, regional, national, European, or global level, and is this a matter of efficiency or politics?

3. RELEVANCE FOR FLEMISH FOREIGN POLICY

To answer these questions, the Flemish Research Centre on International Policy (*Steunpunt Buitenlands Beleid*, hereafter: Steunpunt) – the policy advisory research centre on Flemish foreign policy for the period 2007-2011 – organized a contactforum on 'Subsidiarity and multi-level governance' in Brussels on 12 October 2011. The Steunpunt collaborators and promoters considered it indeed interesting to conclude the centre's activities with a day of reflection about subsidiarity and multi-level governance and the relevance of these concepts for the role of a subnational actor in foreign policy. Issues of subsidiarity had been omnipresent in the research within the four thematic pillars of the Steunpunt: European and global affairs; cultural diversity and subsidiarity; economic globalization; and development cooperation and human rights. On the one hand, subsidiarity (governing as close to the people as effectively possible) can be conceived as the rationale for a Flemish foreign policy. On the other, within every foreign policy domain of Flanders (e.g. international cultural policy, trade policy, development cooperation), the region is confronted with questions of (effectively, efficiently and legitimately) allocating and variously dealing with policy responsibilities and competencies at and between multinational, European, national and subnational levels.

It is an interesting observation to make in this introduction that the *role* of the Flemish government (through successive Belgian state reforms) and the *content* of foreign policy everywhere have changed more or less simultaneously, starting in the latter half of the 1970s. While the Belgian state evolved into a federal state and the Flemish (as well as the other regions') government developed and acquired ever more competencies, the substance of foreign policy grew everywhere increasingly away from classic, hard diplomatic and security issues, towards softer dimensions as economic integration, environmental cooperation and cultural collaboration. Thus, it became somehow logical, if not necessary, that with the Belgian state reform of 1993 (the St Michael's agreement / *Sint-Michielsakkoord*), the constitutional reformers decided to allocate to the subnational governments the responsibility

to execute external policies in those domains for which they are internally competent, known as the *in foro interno, in foro externo* principle. Again interestingly coinciding; in the same year the European Maastricht Treaty provided for the possibility of subnational delegations in the Council of Ministers and introduced the concept of subsidiarity in the constitutional system of the European Union.

This simultaneous evolution of more competencies for subnational governments (*in casu*: Flanders) and external (European and multilateral) dimensions to these competencies due to enhanced interdependence pose many questions and challenges for Flemish foreign policy. The Flemish Government had to develop an apparatus to manage its responsibility for external aspects of its internal competencies (internal organization). It had to learn how to cooperate with other policy levels (other federated entities, the Belgian federal level, the EU level and so on; external organization). It had to think about and formulate own international policy positions in its different competency domains (developing and defending positions). In short, it had, regarding both content and form, to search for its role in the multi-level governance of European and world politics.

4. ORGANIZATION OF THE BOOK

The proceedings of the contactforum that are bundled in this book offer a very broad, yet coherent and insightful discussion of the problems and promises of the concepts of multi-level governance and subsidiarity with regard to international politics. A first series of chapters historically and/or conceptually discuss the concept of subsidiarity (and multi-level governance) and its actual relevance. A second series of chapters is of an empirical nature and discusses the history of Flemish foreign policy; the judicial application of subsidiarity by and within Flanders with regard to external policy aspects; and the application of subsidiarity in particular policy domains. Both the Steunpunt researchers and other external colleagues in the field were asked to zoom in on questions, problems and promises of subsidiarity as they have encountered them in their research.

In the first chapter, **Hugo Durieux** analyses the current debates around the principles of subsidiarity and multi-level governance as a way to capture and cope with complexity. He points out that these concepts have some similarities with the classic anarchist theories about the construction of federated societies and decision-models. This allows Durieux to draw attention to similarities and differences between the two schools, and to related criticisms and pitfalls that both anarchism and multi-level governance may encounter (cf. Hardt and Negri's discussion of imperial control). To give just one example, Durieux aptly observes that contemporary governments as Italy's second Berlusconi-government (2001-2005) and Cameron's Conservative-Lib-Dem Government have decentralized and further privatized responsibilities (e.g. on education, health, local policing), while at the same time cutting budgets. This kind of subsidiarity would clearly not enhance basic democracy. Durieux offers many more new intriguing questions than answers. But this will allow the reader to approach the other contributions with a much wider perspective, and as she or he will notice much of the questions raised by Durieux reappear in more concrete shapes elsewhere.

In the next chapter, **Emiel Lamberts** explores and explains the history of the principle of subsidiarity in the European Union. The author especially focuses on the social-Catholic roots of the subsidiarity principle, bringing together a proscriptive as well as a prescriptive interpretation and a socio-functional as well as (to a lesser degree) a political-territorial

application. Lamberts then goes on to show how this vision of subsidiarity became embedded in the European integration process, to a large extent through important European figures with a Christian democratic background (e.g. Schuman, De Gasperi, Adenauer, Delors). Lamberts concludes that with the Lisbon Treaty, the principle of subsidiarity has been laid down as a fundamental rule of European integration, albeit from a social-Catholic viewpoint in a reduced and leaner form: with a dominating political-territorial and proscriptive application.

While Durieux discusses in a philosophical way the similarities and differences between subsidiarity and multi-level governance and anarchism, and the problems they are both contemporary confronted with and Lamberts has analysed the social-Catholic historical roots of the contemporary application of the subsidiarity principle in the European Union, **Kees van Kersbergen and Bertjan Verbeek** complete the first, theoretically oriented part of the book. They discuss how the subsidiarity principle, as actually implemented in the EU since the Maastricht Treaty, has contributed to new conflicts in the Union. Their analysis puts forward three claims: first, subsidiarity is a compromise between various ideologies serving to circumvent agreement on a fixed and clear division of competencies in the EU; second, the application of the principle has produced a political struggle over actual policies which until present seems to have mainly benefitted the member states. Third, the concept of multi-level governance entails many different interpretations; if defined as existence of interdependence between players (public/private, different levels), it may work to the advantage of specific subnational veto players. Van Kersbergen and Verbeek conclude that the adoption of subsidiarity has not brought a clear demarcation of competencies, but has ushered in a battle among old and new players. They thereby very rightly stress that the interpretation of subsidiarity is a very *political* exercise and act, notwithstanding the rather technical, consensual and almost a-political connotation of the concept – as is the case with its nephew multi-level governance. The division of competences between different levels makes certain policies (e.g. redistribution) more or less possible or expedient. Therefore, multi-level governance is inherently power-relevant (see Devos, 2001; Scharpf, 2006).

These three texts have laid out a general spectrum of perspectives to incorporate in the more concrete analyses of the international role of Flanders, and of the practice of multi-level governance in the domains that the *Steunpunt* has covered. Steunpunt senior researcher **David Crielkemans** links the theory and Flemish practice of subsidiarity in external relations to three approaches in relevant literature on sub-state diplomacy and foreign policy. As the author has expertise with Flemish foreign policy almost since its origin, which is demonstrated by several examples in this chapter, he claims that over time, Flemish sub-state diplomacy, in its relation to other policy levels and players, has been evolving from a state of discordance, over duplication to complementarity.

Werner Vandenbruwaene in his discussion of the judicial application and enforcement of subsidiarity takes up with the complexity and political and contested character of the principle as established by the former authors. Vandenbruwaene finds that enforcement of subsidiarity remains difficult, but that procedures as impact assessment and the ‘early warning system’ may be worthwhile, although they simultaneously need further elaboration. With regard to the Belgian context, implementation of the Protocol on subsidiarity should be re-evaluated with regard to a more cooperative approach. He ends with the conclusion that more profound scrutiny of subsidiarity can only enhance legitimacy in a multilayered polity as the EU or Belgium.¹

¹ As this contribution is a legal analysis, the reference system is different from the other, social sciences, contributions.

Next, **Evert Waeterloos and Robrecht Renard** discuss the interesting domain of development cooperation. As is also the case in many other domains, different principles and objectives pull development cooperation in different directions, not always with positive results. The international community realized that effectiveness of aid had to be strengthened, namely through donor cooperation and a rational division of labour between donors. However, in the same period, a wide range of new aid actors have stood up and the involvement of subnational European governments has expanded in the name of subsidiarity. With regard to the Belgian context, Waeterloos and Renard find that, notwithstanding a learning process has taken place, reconciling the tension between rationalization and subsidiarity within the 'European Division of Labour' requires a fuller enactment of the subsidiarity principle at the intermediate level of the Belgian nation.

The next two chapters deal with subsidiarity and EU cultural policies. **Jan Loisen** focuses on the tension between EU trade policy, a supranational competence, and cultural policies for which the member states are competent. He discusses the concept of global subsidiarity as a potential complement to the narrower subsidiarity perspective that is often adopted by observers and practitioners in the EU in thinking about reconciling economic and cultural objectives on a supranational scale. Global subsidiarity (a concept developed together with Robert Howse by Kalypso Nicolaidis, one of the speakers at the contactforum) has three essential features: institutional sensitivity, political inclusion and top-down empowerment. The author concludes that these principles offer a promising way forward in reconciling economic and cultural values in global cultural policy, and finds that while the EU seems to be embarking on this way, it still has a way to go to do them full justice.

Karen Donders discusses the application of subsidiarity in the interrelationship between EU State aid policy and public service broadcasting. In the EU, most member states and public broadcasters maintain that the member states are exclusively competent for media policy and public broadcasting in particular (and have the subsidiarity principle on their side), while the Commission feels that it is competent to some extent on the basis of its exclusive competition responsibility. The author concludes that debates on subsidiarity have clouded the more substantial debates on the future of public service broadcasting, and that member states and the Commission have been more concerned with power divisions than the actual subject of their actions. This observation echoes similar remarks made by Durieux and van Kersbergen and Verbeek.

Ferdi De Ville in his chapter on subsidiarity and Flemish and EU trade policy argues that subsidiarity is the central problem of contemporary trade governance. The trade-off between (economic) efficiency and (democratic) legitimacy embodied in value conflicts is key to discussions about the future of the WTO. The author notes the striking present structure under which democracies carry the burden of proof when enacting trade restrictive regulation. With the Treaty of Lisbon, in the same name of efficiency and legitimacy, trade policy has (finally) become an exclusive EU competency, implying that (sub)national Parliaments no longer have to ratify trade agreements, while the European Parliament assumes this role. De Ville argues that (sub)national parliaments should seize the room this provides them to start a debate about the social purpose of trade policy, i.e. the balance between free trade and other social objectives democratic societies pursue.

Finally, **Dirk De Bièvre and Lars Thomann** argue that, whereas subsidiarity is often understood as the allocation of decision-making authority to a particular higher or lower level of governance, the allocation of decision-making power can also travel between different

governance arrangements. These are often formally at the same level, yet distinct and with differing enforceability, introducing a *de facto* hierarchy of norms. The authors argue that diverging actor preferences and differing degrees of judicialization account for actors' forum choice. Conceiving of judicialization as the delegation of adjudication to an independent third party and the enforcement through multilaterally authorized sanctions, they show that actors preferring weak regulatory intellectual property rights standards – mostly intellectual property importing countries – strive to pursue interests in forums with low degrees of judicialization, whereas intellectual property exporting countries prefer highly judicialized forums. In their chapter, they demonstrate how these expectations hold in the field of the regulation of plant genetic resources and intellectual property rights for medicines.

REFERENCES

- Beyers, J. & Bursens, P. (2006). *Europa is geen buitenland. Over de relatie tussen het federale België en de Europese Unie*. Leuven: Acco.
- Carozza, P. G. (2003). Subsidiarity as a Structural Principle of International Human Rights Law. *The American Journal of International Law*, 97(1), 38-79.
- de Búrca, G. (2000). *Reappraising Subsidiarity's Significance after Amsterdam* (Harvard Jean Monnet Working Paper 7/99). Cambridge: Harvard Law School. Available online at <http://centers.law.nyu.edu/jeanmonnet/papers/99/990701.html> (Retrieved 30 September, 2011).
- Devos, C. (2001). Machtsrelevantie van Multi-level Structuren: Een Algemene Verkenning. *Res Publica*, 43(1), 81-101.
- Jackson, J. H. (2001). 'The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited. *Journal of International Economic Law*, 4(1), 67-78.
- Howse, R. and Nicolaïdis, K. (2003). Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity? *Governance: An International Journal of Policy, Administration, and Institutions*, 16(1), 73-94.
- Pauwels, C. (1995). *Culture and economy: the fields of tensions in the Community's audiovisual policy. An analysis of the limits and possibilities of a qualitative cultural and communications policy in an economically integrated Europe*. Unpublished PhD thesis (in Dutch), Free University of Brussels.
- Petersmann, E.-U. (2005). Addressing Institutional Challenges to the WTO in the New Millennium: A Longer-Term Perspective. *Journal of International Economic Law*, 8(3), 647-665.
- Scharpf, F. W. (2006). The Joint-Decision Trap Revisited. *Journal of Common Market Studies*, 44(4), 845-864.
- van Kersbergen, K. and Verbeek, B. (2007). The Politics of International Norms: Subsidiarity and the Imperfect Competence Regime of the European Union. *European Journal of International Relations*, 13(2), 217-238.